



Deborah A. Gist
Commissioner

State of Rhode Island and Providence Plantations
DEPARTMENT OF EDUCATION
Shepard Building
255 Westminister Street
Providence, Rhode Island 02903-3400

Ms. Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

CC Docket No. 02-6

October 9, 2014

Re: Request for Waiver: Appeal of USAC Denial of 2014 Funding Year Application
Entity & BEN: Rhode Island Department of Elementary and Secondary Education
BEN 120839; FCC RN 0012488854
Contact Person: David V. Abbott, Deputy Commissioner/General Counsel
Contact Information: 255 Westminister Street, Providence, RI 02903-3400
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Service Providers: OSHEAN (SPIN 143005312); Fiber Technologies (SPIN 143019354); Cox
Rhode Island (SPIN 143016764)
Form 471 Application No. 936734
FRNs: OSHEAN (2627750); Fiber Technologies (2627626); Cox Rhode Island
(2632881)

Dear Ms. Dortch:

Background:

By letter dated September 11, 2014 and received on September 23, 2014, the Universal Service Administrative Company (USAC) denied the appeal of the Rhode Island Department of Elementary and Secondary Education (RIDE) related to its Form 471 Application No. 936734. The September 11th denial was in response to an appeal filed by RIDE on July 3, 2014. According to the USAC denial letter, the Administrator's Decision on Appeal concluded that "at the time you submitted your FCC Form 471 application, you did not have a contract with your service provider(s) which met your state and local or the FCC's definition of a contract." RIDE maintained in its appeal, and reiterates herein, that the service provider contracts in question (Funding Requests 2627626, 2627750, and 2632881) were signed contemporaneous

to the Form 471 filing – or, at worst – within 50 minutes of the filing, and that the incorrect date of contract execution was the result of administrative error.

On May 15, 2014, the Rhode Island Department of Education (RIDE) received a Funding Commitment Decision Letter formally denying our funding year 2014 funding request as set forth in FCC Form 471 Application No. 936734. The sole reason stated for denying funding for the three statewide consortium Service Providers (OSHEAN, Fiber Technologies, and Cox Rhode Island) was that “[n]o contract was in place when the FCC Form 471 Certification was filed.” It is not surprising that USAC ruled the way it did: the contracts signed by RIDE and the aforementioned three service providers were dated March 26, 2014 and our Form 471 was submitted on March 25, 2014. However, for the reasons more fully set forth below, RIDE has determined that the date of March 26, 2014 was in fact entered in error by a RIDE staff member. As detailed below, the three service provider contracts were in fact signed by both the Commissioner of Education and each respective service provider at the time of our Form 471 filing.

Rule:

47 C.F.R. § 54.504 is the source of the rule relied upon by USAC in its denial of 2014 funding for the entire State of Rhode Island. Section 54.504(a) states, in pertinent part, “An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall, **upon signing a contract for eligible services**, submit a completed FCC Form 471 to the Administrator.”

Nature of Waiver Request:

The Rhode Island Department of Elementary and Secondary Education (RIDE), on behalf of the Rhode Island statewide consortium, did in fact have signed contracts with all service providers. A subsequent clerical error resulted in the wrong date being entered on those contracts. However, as the facts recited below will demonstrate, there has been no violation of 47 C.F.R. § 54.504(a) and RIDE accordingly asks that the USAC formal denial of funding for funding year 2014 be reversed. Should the FCC determine that said regulation was violated, RIDE maintains that such violation was *de minimus* and asks that Section 54.504(a) be waived.

Facts:

The facts of this appeal/request for waiver are fairly straightforward. USAC is well familiar with the work that is entailed in preparing a Request for Proposals, awarding bids, and subsequently entering into contract negotiations with the successful bidder(s) until a contract is agreed to, then signed by the service provider, and finally, signed by the Commissioner of Education on behalf of the State. In this particular situation, OSHEAN signed its contract on February 26, 2014, Fiber Technologies signed on February 27, 2014, and Cox Rhode Island signed on March 21, 2014, a Friday.

RIDE leadership was well aware of the impending deadline for filing the Form 471. I, the Deputy Commissioner, was at the time serving as Interim Chief of the responsible Division of Fiscal Integrity and Efficiencies. I knew that we were working with Cox Rhode Island to get the last of our three consortium contracts signed and was aware that it was delivered on Friday, March 21st. We had previously made the decision to have the Commissioner sign all three service provider contracts at the same time.

In my role as General Counsel, I personally present all contracts and grant awards to the Commissioner for signature. We have a weekly time set aside specifically for that purpose. Cynthia Brown, Director of our Office of Statewide Efficiencies, delivered the Cox, OSHEAN, and Fiber Technologies contracts to me on March 21st. She confirmed that the deadline for our E-rate application was March 26th. We looked at my calendar and found that my next 1:1 with the Commissioner was set for Tuesday, March 25th at 10:00 a.m. I informed Cindy that the contracts would be signed in my 10 o'clock meeting and she confirmed that such timing would work for us. I subsequently learned that Cindy informed Karen Cooper, our E-rate Coordinator, that the contracts would be signed on Tuesday, March 25th at 10:00 a.m.

The three service provider contracts were added to my contracts and grants folder and the Commissioner did sign them during our 1:1 meeting, which, as always, began promptly at the top of the hour. I have served as General Counsel for Commissioner Gist since her appointment in 2009. During that time, I can affirm that it is her practice to sign, but not contemporaneously date contracts or grant awards. It is incumbent on me to know when documents need to be signed and to ensure that her signature is affixed in a timely manner. These documents are then returned to program staff, who then exercise the ministerial function of dating the document based on my representation of when they were actually signed.

Contemporaneously to the Commissioner affixing her signature to the three service provider contracts, E-rate Coordinator Cooper initiated the process of submitting our Form 471 E-rate application. Based on her supervisor's representation that the contracts "would be signed at 10 o'clock," Ms. Cooper initiated the process at 10:08 a.m. She has subsequently informed me that she started the process as early as she could to ensure that we would be able to make a timely filing should there be a delay in the electronic filing process, which has happened in the past, especially if there is significant traffic on the system.

Once she received confirmation of a timely filing of the Form 471 application, E-rate Coordinator Cooper used the remainder of the day on March 25th to ensure that all supporting documentation was in order to allow for submission on the deadline of March 26th. What Ms. Cooper did not notice as she uploaded the signed contracts is that her supervisor, Cynthia Brown, had erroneously entered the date of 3/26/14 next to the Commissioner's signature on all three service provider contracts, the date the signed contracts were returned to her for submission to USAC. It is therefore not surprising that USAC took the action that it did.

On April 16th, RIDE received a PIA (Program Integrity Assurance) "request letter" that contained a preliminary denial of Rhode Island's consortium application due to the apparent fact that the contract was signed a day after filing the Form 471. In conversations with PIA representative David Cosgroves, E-rate Coordinator Cooper learned that revised contracts would not be necessary, but that USAC would need a written explanation of the apparent discrepancy between execution of the contracts and the date affixed thereto. Ms. Cooper wrote such an explanation in an email dated April 17, 2014, apparently based on her own misunderstanding of what had actually transpired. Despite assurances received from the PIA representative that a short explanation would resolve any USAC concerns, RIDE received the Funding Commitment Decision Letter dated May 15, 2014 denying all E-rate funding on May 20, 2014.

Discussion:

47 C.F.R. § 54.504 is the source of the rule relied upon by USAC in its denial of 2014 funding for the entire State of Rhode Island. Section 54.504(a) states, in pertinent part, "An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall, **upon signing a contract for eligible services**, submit a completed FCC Form 471 to the Administrator." (Emphasis added). This language has not changed in many years, although it was codified at 47 CFR § 54.504(c) until the section was amended in 2012.

OMB 3060-0806, FCC Form 471 Instructions – December 2013 further clarifies that the applicant filing Form 471, by checking Item 31, "You also certify that there are **signed contracts** covering all of the services listed on this Form 471 except for those services provided under non-contracted tariffed or month-to-month arrangements." Interestingly, the USAC Funding Commitment Decision Letter to RIDE dated May 15, 2014 states that, "FCC Rules require that a contract be signed **and dated** by the applicant prior to the filing of the FCC Form 471 Certification for the products and services requested." (emphasis added). Although it is probably not dispositive of the case at hand, this does appear to be a misstatement of the requirement for a signed (not necessarily dated) contract as required by § 54.504(a) and further described in OMB 3060-0806.

In the *Archer Public Library Order* the Federal Communications Commission (Commission) determined that applicants may correct clerical or ministerial errors on their Form 471 without having to file new funding requests with USAC. *Achieve Career Preparatory Academy Toledo, OH, et al*, DA 11-1208, (July 27, 2011), citing *Archer Public Library Order*, 23 FCC Rcd 15518; appendix A. In *Achieve*, the Commission recommitted itself to ensuring that there are no instances of "waste, fraud, or abuse," but explicitly recognizing that strict compliance with rules – or interpretations of rules – may be inconsistent with the public interest and reserved the right to "take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). In fact, the Commission has consistently granted outright waivers of the requirement of having signed service provider contracts that is currently codified at Section 54.504(a).

For example, in the *Barberton City School District Order*, the Commission granted a waiver of the signed contract rule for schools that had submitted a Form 471 a day before signing its contract; submitted a Form 471 ten days before signing a contract; submitted a Form 471 three days before signing a contract; and submitted a Form 471 five days before executing a contract. *Barberton City School District Order*, 23 FCC Rcd 15526 (2008). There are numerous other examples of the Commission's willingness to grant outright waivers of the "signed contract" rule, including cases involving employee error or misunderstanding of rules and/or other exigent circumstances. See, *Animas School District 6*, DA 11-2040, (December 22, 2011). It is important to note that the *Animas Order* cites *Barberton* for the standard that "minor mistakes" should not warrant the complete rejection of a petitioner's E-rate application barring a finding of waste, fraud, or abuse. See also, *Achieve Career Preparatory Academy, et al*, DA 11-1208 (July 27, 2011).

Previous Orders of the Commission are cited herein to demonstrate that there has been a long and consistent set of precedents that the Commission will generally not uphold denial of funding by the USAC based solely on an applicant's failure to comply with that portion of Section 54.504 that allows an e-Rate applicant to file a Form 471 only "upon signing a contract for eligible services." Unlike the waivers granted by the Commission in the circumstances cited herein, Rhode Island in fact did have signed contracts in place at the time of filing its Form 471. The only ministerial or clerical error is that the contracts were erroneously dated a full day after the contracts were signed and executed.

As the facts set forth herein demonstrate, and as further attested to in the Affidavit set forth as Appendix C, Commissioner Gist signed all three service provider contracts in her 10 o'clock meeting on March 25th. They became legally effective upon signing. Our E-rate Coordinator submitted the Rhode Island consortium's Form 471 at 10:08 a.m. on the same date. Rhode Island believes that there could be no clearer instance in which a clerical error of this type does not warrant a complete rejection of an entire state's E-rate funding.

Conclusion:

Given that Rhode Island is a statewide consortium, failure to approve Rhode Island's appeal of the USAC Funding Commitment Decision Letter of May 15, 2014 will result in a denial of E-rate funding for the entire state for funding year 2014, unless the FCC approves a waiver. As the Commission has observed, "rigid adherence to certain E-rate rules and requirements that are 'procedural' in nature does not promote the goals of section 254 of the Act – ensuring access to discounted telecommunications and information services to schools and libraries – and therefore does not serve the public interest." *Adams County School District 14*, FCC 07-35, ¶ 10 (March 28, 2007). In this instance, there has admittedly been a clerical error in terms of affixing an incorrect date to three contracts, but the fact remains that Rhode Island did comply with § 54.504(a) in that the three service provider contracts were signed, or, at worst, in the process of being signed at the exact moment

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that Rhode Island submitted its Form 471 Application. For the foregoing reasons, Rhode Island respectfully requests that the USAC Funding Commitment Decision Letter of May 15, 2014 denying E-rate funding be overturned.

Please feel free to contact me directly with any requests for additional information or clarification that you may have.

Very truly yours,



David V. Abbott
Deputy Commissioner/General Counsel

DVA/crb

Enclosures:

- Appendix A – USAC Decision on Appeal dated September 11, 2014
- Appendix B – RIDE Letter of Appeal of USAC Denial of 2014 Funding Year Application dated July 3, 2014
- Appendix C – Funding Commitment Decision Letter dated May 15, 2014
- Appendix D – Affidavit of David V. Abbott
- Appendix E – Service Provider Contract (OSHEAN)
- Appendix F – Service Provider Contract (Fiber Technologies)
- Appendix G – Service Provider Contract (Cox Rhode Island)